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No. 91-660

In The

Supreme Court of the United States

October Term, 1991

DOWNTOWN AUTO PARKS, INC.,

Petitioner,

v.

CITY OF MILWAUKEE, a municipal corporation, and WILLIAM RYAN DREW, Commissioner of the Department of City Development,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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November 13, 1991

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QUESTION PRESENTED

Do independent contractors soliciting business from the government have the same protection under the First Amendment as public employees?

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I. STATEMENT OF THE CASE

Respondents, City of Milwaukee and William Ryan Drew (hereinafter "City" and "Drew"), accept petitioner's, Downtown Auto Parks, Inc. (hereinafter "Downtown"), statement of the case, except as noted in the paragraph below. Respondents further accept Downtown's appendix and will make reference to it in the same manner used by Downtown (App. ___).

In the course of its argument, Downtown attempts to remove itself from the category of independent contractor and place itself into the category of a person who has a

claim of entitlement to property by stating that it was an "extended lessee" which had been "approved" for another extension of a lease and, therefore, was not in competition with other independent contractors for City business. (Pet. 11-12). The approval referred to by Downtown was a favorable recommendation by the City's Parking Commission, which had the authority to recommend to the City's Common Council, but not award, parking leases and contracts. (Pet. 3; App. 2, 16). Accordingly, both the District Court and the Seventh Circuit found that Downtown had no property interest in its expired leases. (App. 8-11, 15-17). Downtown has not contested this finding and, accordingly, is now foreclosed from arguing that its status was anything other than that of an independent contractor which was in competition with other independent contractors for City business. (Pet. 6).

II. REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The petition should not be granted because the Seventh Circuit's decision (1) does not conflict with any decision of this court, (2) follows an unbroken line of authority, and (3) was correctly decided.

A. The Seventh Circuit's Decision Does Not Conflict With Any Decisions Of This Court.

Downtown argues that the Seventh Circuit decided this case in a way that conflicts with *Perry v. Sindermann*,

408 U.S. 593 (1972). Downtown asserts that the statement in *Perry* that "[the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech." *id.* at 597, means that independent contractors seeking governmental business are entitled to the same protection under the First Amendment as are public employees who have no proprietary rights to their jobs. *Perry*, however, did not address the question of whether independent contractors seeking governmental business enjoy the same protection under the First Amendment as employees of the government. *Perry* concerned an employee of the government who alleged that his employment was not continued as a result of protected activities he undertook while employed by the government. *Id.* at 594-595. By rejecting a distinction between public employees who have proprietary rights to their jobs and public employees who do not, this Court held that the nature of the employment relationship was not relevant to deciding the extent of protection afforded public employees under the First Amendment. *Id.* at 597-598.

Because a public employee's criticism of his superiors on matters of public concern is constitutionally-protected speech, distinctions among employees based upon the nature of their employment relationship would deprive employees who do not have a proprietary interest in their jobs of First Amendment protection. *Perry*, therefore, extended First Amendment protection to public employees who do not have a proprietary interest in their jobs. Otherwise, as recognized in *Perry*, the government could avoid the prohibitions of the First Amendment by

defining the employer-employee relationship in a non-proprietary fashion and thereby "produce a result which [it] could not command directly." *Id.* at 597 (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)). *Perry* did not, as alleged by Downtown, extend the First Amendment protection to all persons who have a contractual relationship with the government or, as is the case here, persons who have no contractual relationship with the government but seek to enter into one. The Seventh Circuit's decision in this case, therefore, does not conflict with *Perry*.

B. The Seventh Circuit's Decision Follows An Unbroken Line of Authority.

The distinction between public employees and soliciting independent contractors in the context of the First Amendment has been made by four circuit courts, all of which have held that the protection of the First Amendment enjoyed by public employees does not extend to independent contractors which are seeking business from the government.

In *Sweeney v. Bond*, 669 F.2d 542, 545 (8th Cir.), *cert. denied sub nom. Schenberg v. Bond*, 459 U.S. 878 (1982), and *Fox & Co. v. Schoemehl*, 671 F.2d 303 (8th Cir. 1982), the Eighth Circuit refused to extend to independent contractors the Court's holding in *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), that public employees are protected by the First Amendment from discharge solely because of partisan political affiliation or nonaffiliation. In *Sweeney*, the court held that the partisan

dismissal of "fee agents" who were independent contractors did not violate the First Amendment. In *Fox & Co.* the court reaffirmed its decision in *Sweeney* and held that dismissal of an accounting firm solely because the firm did not support the mayor did not violate the First Amendment.

The Third Circuit ruled in accord with the Eighth Circuit in *Horn v. Kean*, 796 F.2d 668 (3rd Cir. 1986) (en banc) (partisan dismissal of motor vehicle agents who were independent contractors did not violate the First Amendment). The Seventh Circuit applied the rule to unsuccessful bidders in *LaFalce v. Houston*, 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 464 U.S. 1044 (1984), and *Triad Assoc., Inc. v. Chicago Hous. Auth.*, 892 F.2d 583 (7th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 L.Ed. 2d 97, 111 S.Ct. 129 (1990).

The Seventh Circuit in this case recognized that this Court's decision in *Rutan v. Republican Party of Illinois*, 868 F.2d 943 (7th Cir. 1988) (en banc), *rev'd*, 497 U.S. ___, 111 L.Ed. 2d 52, 110 S.Ct. 2927 (1990), *on remand*, 916 F.2d 715 (7th Cir.) (unpublished disposition), altered some of the assumptions upon which the *LaFalce* and *Triad* decisions were based, but concluded that *Rutan*, although extending First Amendment protection to applicants for employment, did not address the question of whether the same protection should be extended to independent contractors. (App. 6-8). The Seventh Circuit also noted that since *Rutan* had been decided, the Sixth Circuit had refused to prohibit the government from considering political criteria in awarding public contracts, citing *Lundblad v. Celeste*, 874 F.2d 1097, 1102 (6th Cir. 1989), *vacated*, 882 F.2d 207 (6th Cir. 1989), *reinstated in part*, 924

F.2d 627 (6th Cir.), (en banc), *cert. denied*, ___ U.S. ___, 115 L.Ed. 2d 1054, 111 S.Ct. 2889 (1991). (App. 7-8).

C. The Seventh Circuit Decided The Case Correctly.

In *LaFalce v. Houston*, 712 F.2d 292, the Seventh Circuit aptly described the differences between public employees and independent contractors in the context of the First Amendment. The differences described by the court compelled it to conclude that the protections of the First Amendment should not be extended to rejected bidders for public contracts who claim that their bids were rejected for partisan reasons. The court surmised that independent contractors tend to be less dependent upon government jobs than are public employees, have no particular political orientation, and usually have connections with both major parties to protect their business interests. *Id.* at 294. The court questioned whether court-imposed political impartiality would have much effect on the "cautious neutrality that characterizes the political activities of American business." *Id.* The court was not convinced that the consequence of eliminating patronage from public contracting was wholly desirable.* Finally, the Seventh Circuit feared that "a decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser." *Id.*

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* *See also* on this point in reference to patronage employment *Rutan*, 111 L.Ed. 2d at 78-93 (dissenting opinion).

The court concluded that the "differences in strength of competing interests in the two classes of cases" were enough to convince the court not to extend First Amendment protection to independent contractors seeking governmental business. *Id.* at 295. The court was convinced that federalizing the law of public contracting to the same extent that the law of public employment had been federalized would, in light of the burdensome consequences, be of no net benefit to the nation because the court thought it unlikely that business firms which generally stay on good terms with major political groupings in society would, if protected by the First Amendment, engage in political conflict with the very groups whose business they are seeking. *Id.* at 294.

The Seventh Circuit in this case concluded that the rationale stated in *LaFalce* was still valid, except that in *Rutan* this Court expressed less concern about flooding the federal courts with new First Amendment claims than did the Seventh Circuit in *LaFalce*. (App. 7). Because *Rutan* was solely concerned with public employment, the Seventh Circuit saw no need to reexamine its decision in *LaFalce*. (App. 7-8).

In *Rutan*, this Court extended the protection of the First Amendment to applicants for public employment. This Court held that conditioning hiring decisions on political belief and association created a burden upon free expression of constitutional magnitude because (1) a government job, which provides a paycheck, health insurance and other benefits, is valuable; (2) when the private sector of the economy is slow, the only other jobs that might be available are with the government; and (3) there are certain occupations for which the government is the major or only employer. 111 L.Ed. 2d at 68.

The characteristics of government employment that swayed this Court in *Rutan* are not shared by independent contractors. Because contractors are self-employed, they neither seek nor need the security of government employment. Independent contractors generally sell their goods and services to a large number of both private and public sector purchasers. Those few contractors who sell goods or services only to the government, generally, as part of their business practice, maintain close relationships with the governments they serve. Because these distinctions are valid, this Court's decision in *Rutan* does not compel a different result in this case.

III. CONCLUSION

For the foregoing reasons, the writ of certiorari to review the judgment and opinion of the Seventh Circuit Court of Appeals should be denied.

Respectfully submitted,

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